to cases where the alternative promises are severable. The legal part is enforceable but the illegal part is void. In case the promises are inseparable, the whole contract is void.

Order of performance (Section 52) : (i) Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; (ii) Where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Consequences of Preventing Performance (Section 53)

When a contract contains reciprocal promises, and one party to the contract prevents other from performing his promise, the contract becomes voidable at the option of the party so they prevented, and he is entitled to compensation from the other party for any loss which he may sustain inconsequence of the non-performance of the contract.

Effect of default (Section 54) : When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, such promisor cannot claim the performance of reciprocal promise and must make compensation for any loss which such other party may sustain by the non-performance of the contract.

APPROPRIATION OF PAYMENTS

Appropriation means application of payments. The question of appropriation of payment is closely connected with the question of time and place of performance as to several debts owing by one party to another. When a debtor (customer) owes several distinct debts to the same creditor (banker) and make a payment without instruction to the creditor, the question may arise against which debt the payment is to be appropriated. The principles are incorporated in Sections 59-61 of the Indian Contract Act, 1872. In England the law on the subject was paid down in *Clayton's Case* (1816).

1. **Express Appropriation by Debtor :** According to Sec. 59 of the Indian Contract Act. the debtor has the right to instruct expressly which debt. if he owes more than one. shall be cancelled by the money he tenders to the creditor.

   Example : A owes to B among other debts the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

2. **Implied Appropriation by Debtor :** If there is no express instruction as to the appropriation. there may be circumstances which imply that the debtor intended appropriation to a particular debt. the debtor's intention must be followed if money is accepted. If the creditor does not agree to the specific directions of the debtor as to the appropriation. he must refuse to accept the payment.

   Examples : (i) A owes B among other debts. Rs. 1,000 upon a promissory note which falls due on Ist June. He owes no other debt of that amount. On the 1st June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note. (ii) A owes to B among other debts. the sum of Rs. 5670. B writes to A and demands the payment of this sum. A sends to B Rs. 5670. This payment is to be applied to the discharge of the debt of which B had demanded payment

(ii) **Alteration :** The term *'alteration'* may be defined as change in one or more terms of the contract. The alteration is valid when it is made with the consent of all the parties. The valid alteration discharges the original contract, and the parties become bound by the new contract (i.e., contract with altered terms).

(iii) **Rescission :** If the parties to a contract agree to rescind it, the original contract need not be performed. The recession of a contract may occur under various circumstances : (a) It may be done by *mutual consent* (Sec. 62). (b) Where a party to a contract fails to perform his obligations, the other party can *rescind* the contract without prejudice to his rights to receive compensation for breach of contract. (c) In a *voidable* contract, one of the parties has the option of rescinding it.

(iv) **Remission (Sec. 63) :** It is the acceptance of a lesser sum than that was contracted for or a lesser fulfilment of the promise made. It is a unilateral act of the promisee discharging, at his will and pleasure, the obligation of another. A promisee may remit or give up a part of his claim and a promise to do so is binding even though there is no consideration for doing so. The effect of the provision is that the party who has the right to demand the performance of a contract may : (a) remit or dispense with it, wholly or in part; or (b) extend the time for performance; or (c) accept any other satisfaction instead of performance.

(v) **Waiver :** It means to *"dispense with"* or the abandonment of a right which a person is entitled to. A party to a contract may waive his rights under the contract, whereupon the other party is released from his obligation.

(vi) **Merger :** When a superior right and an inferior right coincide and meet in one and the same person, the inferior right vanishes into the superior right. This is known as *merger.* A man holding property under lease buys the property. His rights as a lessee vanish. They are merged into the rights of ownership which he was now acquired.

Illustration : A is a tenant of B's flat. A purchases the flat from B. A's tenancy is inferior right to B's ownership. As the ownership (superior right) vests in A on purchase, the tenancy of A merges and is extinguished in ownership. A becomes owner and ceases to be a tenant.

Differences between Novation and Remission

1. In the case of novation, the agreement affects the *rights* of both the parties to the contract. But in the case of remission, the agreement affects the rights of only one party, viz., the promisee.
2. In the case of novation, *consideration* is implied in the form of mutual renunciation of rights. On the other hand, in the case of remission, the promisee can discharge the promisor without consideration.
3. Novation may be between the old *parties* or between different parties, whereas remission is between the same parties.

Differences between Novation and Alteration

1. In the case of novation, there may be *change of parties.* But in the case of alteration, the parties remain the same, and only the terms of the contract are altered.

2. In novation, the original *contract* is totally substituted. But in alteration, the original terms may continue to be part and parcel of the contract.

Differences between Novation and Rescission

1. In the case of novation, a new *contract* is substituted for the old one. But in the case of rescission, no new contract is substituted in the place of the old one, and only the old contract is cancelled.
2. Novation may be between old *parties* or between new parties. But rescission is only between old parties.

DISCHARGE OF CONTRACT BY OPERATION OF LAW

In the following cases, the rights and liabilities arising out of the existence of a contract are discharged by operation of law.

(a) **Insolvency :** The insolvency of the promisor discharges the contract. The promisor is discharged from all liabilities incurred prior to his adjudication.

(b) **Merger :** It occurs when there is acceptance of a higher right or security in the place of the lower. It is an operation of law which extinguishes a right by virtue of its coinciding with another and greater right in the same person.

(c) **Death :** Where performance of a contract is required to be made in person and the personal qualification of the promisor are the consideration for the contract, the death of the promisor discharges the contract. In other contracts the rights and liabilities of the deceased person pass to his legal representatives.

(d) **Lapse of time :** The Limitation Act, 1963 provides that a contract should be performed within a specified period. Such a period is called *period of limitation*. If the contract is not performed, and if no legal action is taken by the promisee within the period of limitation, he is deprived of his remedy at law. In other word, the contract in such a case is terminated.

(e) **Material alteration or unauthorised alteration :** It means a change in one or more of the terms of a contract. Any alteration if made in writing without other party's consent, the contract is discharged provided that the alteration is in a material part. Where the alteration is immaterial, the deed is not vitiated. It matters not if such alteration was made by a stranger or by a party to the deed. A party of to a contract is not discharged by an alteration which he has authorised.

DISCHARGE OF CONTRACT BY IMPOSSIBILITY
(SUPERVENING IMPOSSIBILITY OR FRUSTRATION)

Meaning : According to Sec. 56, impossibility of performance may fall into (i) impossibility existing at the time of contract known as *pre-contractual* or *initial impossibility*, and (ii) subsequent or supervening impossibility also known as *post-contractual* impossibility. The agreement in the first case is *void ab initio* due to absolute impossibility.

Section 56 of the Contract Act says that "*an agreement to do an act impossible in itself is void*". It further lays down that even though the act was not impossible, or unlawful at the

(4) **Self Induced Impossibility :** When the impossibility is due to the default of the contracting party himself. Section 56 would not apply. In such cases, the contract is not discharged on the ground of frustration. That is, a contract is not discharged in case of self-induced impossibility.

(5) **Strikes, Lock-outs, and Civil Disturbances :** Strikes, lock-outs and civil disturbances also do not discharge a contract unless the parties have specifically agreed in this regard at the time of formation of the contract.

(6) **Partial impossibility or Failure of one of the objects :** Where a contract is made for several purposes, failure of one of the objects does not discharge the contract.

(7) **Rights and Obligations under a transfer of property under a case :** Doctrine of frustration does not apply to leases including those of agricultural land.

(8) **Temporary interruption or Intervention :** A temporary interruption in the performance of a contract does not discharge the contract.

(9) **Matters with the contemplation of parties :** When the parties have the knowledge or the reasonable source to contemplate the event, the doctrine of frustration as a rule is not applicable. The doctrine of frustration is applicable only when the frustrating event is outside the contemplation of the contracting parties.

In India the leading case is ***Satya brata Vs. Mangiram Bangur & Co. (1954)*** where the Supreme Court has clarified that the doctrine of frustration is really an aspect of part of law of discharge of contract by reason of supervening impossibility.

INSTANCES COVERED UNDER SUPERVENING IMPOSSIBILITY	EXCEPTIONS TO THE PRINCIPLE OF SUPERVENING IMPOSSIBILITY.
1. The destruction the subject-matter of contract.	1. Difficulty of performance.
2. Death or personal incapacity.	2. Commercial impossibility.
3. Change of law.	3. Impossibility due to the failure to a third person on whose work the promisor relied.
4. Non-existence or non-occurrence of a particular state of things.	4. Self induced impossibility.
5. Declaration of law.	5. Failure of one of the subjects
	6. Strikes, lockouts and civil disturbances.

Effects of Supervening Impossibility

(1) Section 56 provides that when the performance of a contract becomes subsequently impossible or illegal, the contract becomes void.

(2) Section 64 of the Contract Act further provides that when a contract becomes void, any person who has received any advantage under it must restore it, or make compensation for it, to the person whom he received it.

(3) Sec. 56 (para 3) provides that, "where one person has promised to do something which he know, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise".

Example : P contracts to marry B being already married to C, and being forbidden by the law to which he is subject to practice polygamy. P must make compensation to B for any loss caused to her by the non-performance of his promise.

THE DOCTRINE OF FRUSTRATION

Definition : When the common object of a contract can no longer be carried out, the court may declare the contract to be at an end. This is known as the *Doctrine of Frustration. Anson* says, "Most legal systems make provision for the discharge of a contract where, subsequent to its formation, a change of circumstances renders the contract legally or physically impossible of performance". The law relating to this subject, as in England and India respectively, is stated below.

English Law : Before 1863 a contract, excepting an illegal agreement, was enforced literally. All the parties of a contract had an absolute obligation to perform it. The Doctrine of Frustration emerged after 1863 through court decisions.

In a very old case, decided in 1647, the facts were as follows : A person J got a lease of land from P on a rental basis. Then a German Prince seized the land and it was not possible for J to use it. The landlord P sued for rent. The Court held that J must carry out all the terms on the contract including the payment of rent. *Paradine Vs. Jane.* This case illustrated the rigours of English Law.

Later on many exceptions to the Doctrine of Frustrations were made and on various grounds the court gave relief to aggrieved persons. In the following cases English courts accepted that the contract came into an end : (1) Destruction of an object (2) Change of Law (3) Failure of Pre-conditions (4) Death or Personal Incapacity and (5) Outbreak of War.

Indian Law : In *Satyabrata Ghosh Vs. Mugniram Bangur and Co. and Another,* (1954) the Supreme Court of India discussed the English cases relating to frustration and came to the following conclusions :

The doctrine of frustration of contract comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. It comes within the purview of Sec. 56 of the Indian Contract Act. The word *'impossible'* in this section has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can be said that the promisor finds it impossible to do the act which he promised to do.

REVIEW QUESTIONS

1. What do you understand by discharge of contract? State different ways in which a contract may be discharged.
2. What do you understand by performance of a contract?
3. What contracts need not be performed?
4. State the persons by whom the contract should be performed. In what circumstances performance by a third party is effective?
5. What do you understand by time and place of performance of a contract? Are they always mentioned in the contract?

Parties to a contract are expected to perform their respective promises. If a party breaks his obligation which the contract imposes, there takes place "breach of contract". If the contract is unilateral, the only remedy available to the party who suffers by breach is to claim relief for the breach. If the contract is bilateral, the party who suffers, by breach has two remedies: (i) he can claim relief for breach, and (ii) in certain circumstances, he can be absolved from the further performance of the contract. Breach of contract may be (i) *actual breach of contract*, or (ii) *anticipatory breach of contract.*

1. Actual Breach of Contract

(a) **At the time when the Performance is due :** Actual breach of contract occurs when, at the time when the performance is due, one party fails or refuses to perform his obligation under the contract.

(b) **During the Performance of the Contract :** Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under the contract. This may be discussed under the following two heads:

(i) *Express Repudiation (by word or act) :* Where there has been some performance of the contract and one party by his word or act refuses to continue to perform his obligation in some essential respect, the other party can treat the contract as no longer binding on him and sue the former party for breach of contract.

(ii) *Implied Repudiation or Impossibility created by the act of party to the contract :* If a party, during the performance, makes by his own act the complete performance of the contract impossible, the effect is as if he has breached the contract, and the other party is discharged from the further performance of the contract.

2. Anticipatory Breach of Contract

Anticipatory breach of contract occurs when a party repudiates his liability or obligation under the contract before the time for performance arrives. This may happen in one of the following ways :

(a) **By Renunciation (Express repudiation) :** Anticipatory breach of contract takes place when one party expresses his inability to perform or renounces his liabilities under the contract expressly, before the performance is due. This is known as *express anticipatory breach of contract.*

(b) **By creating some Impossibility (Implied Repudiation) :** A promisor may, before the time for performance arrives, by doing some act make the performance of his promise impossible. The effect in such a case is the same as though he had renounced the contract at that time. This is known as *implied anticipatory breach of contract.*

Rights of the Promisee in case of Anticipatory Breach : (i) He can treat the contract as discharged so that he is absolved from the performance of his part of the promise. (ii) He can immediately take a legal action for breach of contract, i.e., file a suit for damages, specific performance, or injunction. Anticipatory breach does not necessarily discharge the contract. It, however, discharge the promisee (the aggrieved) if he so chooses, and entitles him to sue for a breach at once.

Now, the question arises whether the other party may treat the Renunciation as a Breach and file a suit immediately or wait till the date of performance and then file the suit. This was answered in the case of ***Hochester Vs. D' La' tour (1853).***

On April 12th the defendant touring company engaged the services of the plaintiff the tour to commence from June 1st. On May 11th, the defendant informed the plaintiff that his services were no longer required. The plaintiff filed a suit against the defendant immediately after May 11th. The defendant contended that the plaintiff ought to have waited till June 1st i.e. the due date of performance and then filed the suit. The court negatived the contention and observed as follows :

"A contract is a contract from the time it is made and not when performance is due". The contractual relationship arises from the date of the agreement itself and not from the date of performance. When parties enter into a contract they have two rights:-

(1) To enforce the performance on the due date.

(2) To keep the relationship alive till the due date.

So, if one party renounces the contract before the due date of performance, he snaps the contractual relationship. The other party *may* treat the renunciation as a breach and file a suit immediately. He need not wait till the due date of performance. However, it is only an option. If he waits till the due date of performance, he keeps the contract alive for the benefit of both the parties. The other party may change his mind and perform the contract on the due date. But, he may suffer a disadvantage. If a supervening impossibility occurs between the date of renunciation and the date of performance, the contract will be discharged. The other party will be excused from performing his obligation on the due date of performance.

Frost Vs. Knight : A promised to marry B after the life time of B's father. During the life time of B's father A refused to marry B. B filed a suit against A for breach of promise. A contended that she ought to have waited till the life time of her father and then filed the suit. Court also accepted this contention.

Measure of Damages in Anticipatory Breach of Contract

(i) **If the contract is ended at once :** If the promisee elects to end the contract at once, he can sue the promisor for damages. The amount of damages will be measured by the difference between the price prevailing on the date of breach and the contract price (anticipatory repudiation).

(ii) **If the contract is kept alive till the date of performance of the contract :** If the promisee keeps the contract alive till the date of performance, the measure of damages will be the difference between the price prevailing on the date of the performance and the contract price. The aggrieved party may, after putting an end to the contract, bring an action for damages for breach, but he will be bound under Section 64 to restore to the other party the benefits he might have received under the contract.

REMEDIES IN CASE OF BREACH OF CONTRACT

Where a breach of a contract has been committed by a party, there are several courses of action which the aggrieved party is entitled to pursue. (i) Suit for Damages, (ii) Bring an action for specific performance, (iii) Suit for injunction, (iv) Claim for quantum meruit, (v) Restitution

of the first claim. But the second claim did not arise in the usual course of things and was to remote a consequence.

Restitution and Compensation : Damages are paid as restitution and compensation and not as punishment. In fact through damages, efforts are made to put the party back into the same position as if the contract had been performed. In other words, if a contract is broken, law will endeavour, so far as money can do it, to place the injured party in the same position as if the contract had been performed.

Example : In a contract of sale of goods, the damages are measured equal to the profits, i.e., the difference between the contract price and market price of such goods on the date of breach.

Mental Pain and Suffering : In ordinary cases damages for mental pain and suffering caused by the breach are not allowed. But they may be allowed in special cases. Similarly, a photographer who had agreed to take photographs at a wedding, failed in breach of his contract to appear there. As a result the bride had no photographs of her wedding. She was allowed damages for resulting injury to her feelings.

Mitigation of Loss : The injured party has to take all reasonable steps to minimise the loss caused by the breach. Explanation to Section 73 of the Indian Contract Act reads as under :

"In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account".

The loss caused by the breach must be kept to the minimum. The damages which results due to the negligence of the aggrieved party, are not recoverable.

Neki Vs. Prabhu : The plaintiff took a shop on lease and paid an advance. The defendant could not give him possession and the plaintiff chose to do no business for 8 months though there were other shops available in the vicinity. Held, he was entitled only to a refund of his advance, and nothing more, as he had failed in his duty to minimise the loss by not taking another shop in the neighbourhood.

Liquidated and Unliquidated damages : The term *liquidated damages* means the sum which has been fixed by the parties as a genuine pre-estimate of the damage likely to be caused by the breach of the contract. The parties may try to avoid the delay and the expense involved in litigation and hence decided that amount to be paid as damages also. Where such a sum is fixed by the parties, the court never tries to interfere with it, provided it is reasonable (Sec. 74).

Example : A contract with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation not exceeding Rs. 1,000 as the Court considers reasonable.

On the other hand, if the sum mentioned in the contract is so extravagant and unconscionable as to have no connection with the greatest loss that may possibly result out of the breach, it is known as *Penalty*. In such cases the amount fixed holds the parties in terror.

Interest by way of Penalty : Several times, in bonds and other instruments standing as securities for money, provision for enhanced rates of interest in case of default will be provided. (a) If the stipulation for payment of higher rate of interest is from the date of default, it is a question depending on the facts of each case whether it is a penalty or not. (b) If the enhancement is from the date of the bond or security it is always a penalty. (c) Where compound interest is

payable on default, if it is at the same rate, it is not a penalty. If it is at a higher rate it is a penalty; whether they amount to penalty or not depends on the facts of each case.

Rules Regarding Determination of Amount of Damages (Sec 73)

The purpose of awarding damages is to restore the parties to a position where they would have been if the contract had been performed and not where they would have been if they never made the contract. Further, when parties enter into a contract, they contemplate the performance and not the breach of it. Hence, damages are assessed as on the date of the performance.

The foundation for the modern law of damages was laid down in the case of *Hadley Vs. Baxendale (1854).*

The plaintiff was the owner of a mill. The defendant was a carrier. The plaintiff's mill stopped owing to the breakage of a crank-shaft. He entrusted the broken shaft with the defendant to be delivered to the maker as a pattern for a new one. The only information given to him was that the plaintiff was the owner of the mill and the broken shaft was a part of the machinery.

Due to some neglect on the part of the defendant, the delivery of the shaft was delayed. With the result, the mill remained idle. The plaintiff lost profit which he would otherwise have made. The question before the court was whether the plaintiff was entitled for the loss of profit also?

The court laid down two rules. This statement of the law is generally known as the rule in *Hadley Vs. Baxendale.* This rule is incorporated in Section 73 of The Indian Council Act.

Damages are recoverable in two cases :

Rule 1 : When they arise naturally in the usual course of things, and

Rule 2 : When they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Applying the two rules mentioned above, the court held in the above case, that the plaintiff could not recover the loss of profit. The first rule speaks of compensation for any loss or damage caused to the aggrieved party, which naturally arose in the usual course of things from such breach. This is the actual loss caused to the plaintiff. The test is an *objective test.*

The second rule speaks of loss or damage which the parties *knew*, when they made the contract, is likely to result from the breach of it. Here, the test is *subjective.*

According to Sir William Anson both branches of the rule is the same. *"Recovery depends on foreseeability".*

(i) *Damages for loss arising naturally :* When a party sustains a loss by reason of contract, he is entitled to, so far as money can do it, to be put in the same situation with regards to damages, as if the contract has been performed, subject to the qualification that the *loss or damage* is such : (a) as has *arisen naturally in the usual course of things:* or (b) as the *parties knew*, when they made the contract, to be likely to result from the breach of it; and (c) which is *not remote and indirect.*

(ii) *Mitigation of loss :* In estimating the loss or damage that means which existed for remedying the inconvenience caused by the breach must be taken into account. Thus, when a breach of contract has occurred it is the duty of the party who suffers by such breach to lessen the injurious consequences of the breach i.e. *mitigation of loss.* If he

actual damages caused by the non-performance of the ...

and will not be granted in the following cases :

(i) where *monetary compensation is an adequate remedy*;

(ii) where the *court cannot supervise the execution* of the contract, e.g., a building contract;

(iii) where the contract is for personal service, i.e., a contract to paint a picture;

(iv) where one of the parties is incompetent to contract, e.g., minor;

(v) where the contract is *ultra vires*, e.g., where the contract is made by a company in excess of its powers as laid down in its memorandum of association or against the Companies Act;

(vi) where the contract is made by trustees in *breach of trust*;

(vii) where a material part of the subject-matter of the *contract has ceased to exist*, e.g., where a contract is for the purchase and sale of a ship which is sunk after the contract had been entered into, or where a contract is for the purchase and sale of a building destroyed by fire after it had been entered into.

(viii) Where the contract is *inequitable* to either party. The remedy of specific relief unlike that of damages cannot be obtained as a matter of right but rests entirely on the discretion of the Court.

The contracts which may be specifically enforced are as follows : 1. Agreement to sell or transfer immovable property, 2. Sale with a condition to repurchase, 3. Agreement for exchange of immovable property, 4. Agreement to lease, 5. Contract by limited owner to sell or lease.

SUIT FOR INJUNCTION

An injunction is preventive relief. An aggrieved party can sue for an injunction, i.e., an injunction is an order of the court restraining the wrongdoer from doing, or continuing, the wrongful act complained of. Injunctions are usually granted to enforce negative stipulations in cases where damages are not adequate relief. It is particularly appropriate in cases of anticipatory breach of contract. Injunction may be *temporary* or *perpetual*. Injunction may also be either *mandatory* or *prohibitory*. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts. A prohibitory injunction is negative. Other remedies under Specific Relief Act, 1963 includes *Declaratory Right, Rectification, Restitution, Recision, etc.*

SUIT FOR QUANTUM MERUIT

Quantum Meruit means as much as is earned. Right to Quantum Meruit means a right to claim the compensation for the work already done.

Example : C an owner of a magazine engaged P to write a book to be published by instalments in his magazine. After a few instalments were published, the publication of the magazine was stopped. It was held that P could claim payment for the part already published [Planche Vs. Calburn].

Distinction between Quantum Meruit and Damages

	Quantum Meruit	*Damages*
1.	This right does not arise out of any contract but it is of quasi-contractual nature.	This right arises out of a contract (when it is broken).
2.	This right arises out of some past performance (a) some work is done, or (b) some services are rendered.	This right arises when there is non-performance i.e., breach of a contract.
3.	It is by nature restitutory.	It is by nature compensatory.
4.	It arises when a quasi-contract is in existence	It arises only when a contract is broken.

REVIEW QUESTIONS

1. What do you understand by 'breach of contract?' Distinguish between actual breach and anticipatory breach.
2. What remedies are available to an aggrieved party for a breach of contract?
3. What are the different types of damages which can be awarded by the court?
4. Explain the principles governing the assessment and award of damages for breach of contract.
5. Discuss as to when an aggrieved party can file a suit for specific performance and for an injunction.

PRACTICAL PROBLEMS

Attempt the following problems giving reasons for your answers:

1. A contracts to pay a sum of money to B on a specified day, A does not pay the amount on that day. B in consequence of not receiving the money on that day, is unable to pay his debts and is totally ruined. B claims heavy damages. Advise A.

   (*Hint.* A is liable to pay interest only from the specified day upto the date of payment. In other words B can claim only ordinary damages. B cannot claim heavy damages unless A had notice of the special circumstances resulting in the special loss at the time of entering into the contract).

2. A agreed to erect a plant for B by 31st March, A further agreed to pay Rs.500 per month as damages in case of delay beyond the agreed date. A was late by four months. B sued A for Rs.4,500, the actual loss caused to him as a result of the delay. What damages will you award, and why?

   {*Hint.* B is entitled to recover Rs. 2,000 only, because when a sum is named in the contract as the amount to be paid in the case of breach, the court will allow only reasonable compensation so as to cover the actual loss sustained, within the limits stated in the contract.}

3. A employs B as manager of his factory for a term of three years at a monthly salary of Rs.10,000. Without any lapse on the part of B, A dismisses him after two years of service. B could not get an alternate job elsewhere and files a suit for damages for breach of contract against A. Will he succeed? If yes, assess the amount of damages recoverable by him.

   {*Hint.* Yes, B will succeed. If it cannot be proved that B has failed in his duty to mitigate the loss subsequent upon the breach, B will be entitled to full salary for the whole of the unexpired period of service i.e., one year. Hence the amount of damages recoverable by B amounts to Rs.1,20,000.}

Definition of Contract of Indemnity: Sections 124, 125 and the 127 of the Indian Contract Act deal with contract of indemnity. *A contract by which one party promises to save the other from any loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called* ***Contract of Indemnity****. The promisor in such a contract is called* ***indemnifier*** *while the promisee who is to be protected is called the* ***indemnity holder or Indemnified*** (Sec.124).

Essentials of a Contract of Indemnity

(1) There must be *two parties* in a contract of Indemnity viz., Indemnifier and Indemnified.

(2) A contract of Indemnity may be *express or implied.*

(3) This contract being a *species of contract*, is subject to all the rules of contract, such as free consent, legality of object, etc.

(4) A contract of indemnity is enforceable only when the promisee suffers a loss the happening of which is unknown and against which the Indemnity holder was promised to be protected.

(5) *Consideration* in the case of Contract of indemnity is essential to enable the indemnity holder to make claim to be compensated.

CONTRACT OF GUARANTEE

Definition of Contract of Guarantee: *It is a contract to perform the promise or discharge the liability of a third person in case of his default (S.126). Surety* is a person who gives the guarantee. The person in respect of whose default the guarantee is given is called *'Principal Debtor'*. The person to whom the guarantee is given called the *'Creditor'*.

Essential of Contract of Guarantee

1. **From:** A Contract of guarantee is just like any other contract which may be either oral or in writing.

2. **Tripartite agreement:** Every contract of guarantee involves three agreements between (i) the creditor and principal debtor, (ii) the surety and the creditor, and (iii) the surety and the principal debtor.

Consent of the Parties : There must be consent of all the three parties.

Example : X sells and delivers goods to Y. X afterwards requests Z to pay in default of Y. Z agrees to do so. Here, Z cannot become surety without the consent of Y.

3. **Secondary Liability:** The test which applied to determine whether the contract is one of guarantee or indemnity is whether the obligation has been undertaken at the debtor's request in which case the contract is one of guarantee. If the obligation is undertaken without any request of the debtor, the contract is one of indemnity. The intention of the parties is also important whether making himself primarily or collaterally liable. Hence, the promise to be primarily and independently liable is not a guarantee, though it may be an indemnity. Hence in a contract of guarantee, the primary liability is with the principal debtor.

4. **Existing liability:** It is not necessary that the principal contract must be in existence at the time the contract of guarantee is made; the original contract by which the principal debtor undertakes to repay the money to the creditor may be about to come into existence.

Example : X took a loan of Rs. 10,000 from Y on 1st Jan. 1999 and paid nothing on account of interest and principal. On 2nd Jan. 2002, Z gave the guarantee to Y for the payment of Rs. 10,000 due from X. This is not a valid contract of guarantee because the primary liability between X and Y is a time barred debt which is not enforceable by law.

5. **The promise to pay must be conditional:** In other words, the liability of the surety should arise only when the principal debtor makes a default.
6. **Consideration :** Something done for the benefit of the principal debtor is considered as consideration for the guarantee to make the contract valid. The legal detriment incurred by the promisee at the promisor's request is sufficient to constitute the element of consideration.
7. **Competency:** The principal debtor, surety and creditor must be a person competent to contract. However, under certain circumstances, a surety is liable though the principal debtor is not i.e., the original contract is void as is the case of a contract with a minor in which the surety is liable not only as surety but also as principal debtor *Kashiba Vs. Shripat, (1894).* A person of unsound mind or an undischarged insolvent cannot give a valid guarantee.
8. **Consent:** There must be free consent, otherwise the contract of guarantee may become void or voidable. Generally a contract of guarantee is not contract of the utmost good faith i.e., *uberrimae fidei*, but it is sometimes a first cousin to it. Mere non-disclosure will not effect the contract of surety unless there is an intentional concealment.

Example I : A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duty accounting. C gives his guarantee for B's duty accounting. A does not acquaint C with B's previous conduct. B afterwards makes a default. The guarantee is invalid.

Example II : A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay Rs. 500 per ton beyond the market price, such excess to be applied on liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Kinds of guarantee

A contract of guarantee may be either ' *Retrospective*' e.g., for an existing debt or '*Prospective*' i.e., for a future debt. Guarantee are further divided into '*Specific*' also known as simple or single guarantee and '*Continuing*'. When the guarantee is given for a single or particular debt, it is called a *specific guarantee* and it comes to an end when the debt guaranteed has been paid. A guarantee which extends to a series of transactions is called a *continuing guarantee* (Sec. 129 of the Indian Contract Act).

Guarantee may be for a part of a whole debt or for the whole debt subject to a limit: When the intention of the parties is not explicit it will be presumed that where a portion of a floating balance is guaranteed it is for a part of it only. When portion of a fixed and ascertained debt is guaranteed the guarantee applied to the whole debt subject to the limit.

5. **Right to Share Reduction :** On debtor's insolvency the surety is entitled to claim the proportionate reduction of his liability by the amount of dividend claimed by the creditor (from the Official Receiver of the Principal debtor). Similarly, debtor's debt obligation is scaled down by subsequent legislation, the creditor is entitled to claim proportionate reduction in his liability.

B. Against the Principal Debtor

6. **Right of Suborgation :** After paying the guaranteed debt, the surety steps into the shoes of the creditor and acquires all the rights which the latter had against the principal debtor (i.e., he gets subrogated to all the rights and remedies available to the creditor) (Sec. 140). If the creditor has the right to stop goods in transit or has a lien, the surety, on payment of all he is liable for, will be entitled to exercise these rights.

7. **Right as to Securities with the creditor :** The surety has the right to proceed against such securities of the principal debtor, as the creditor could himself proceed.

8. **Right of indemnity :** The surety is entitled to be indemnified by the principal debtor for all payments rightfully made by him (Sec. 145).

9. **Compel the principal debtor to perform the promise :** The surety has also the right to insist the principal debtor to perform the promise. The surety can, before making payment, compel the debtor to relieve him from liability by paying of the debt, provided that liability is an ascertained and subsisting one.

10. **Prove the Debt in Bankruptcy of the Debtor :** In case of the bankruptcy of the principal debtor, the surety may prove the debt in respect of contingent ability even if he has not been called upon to pay a definite amount.

C. Against Co-sureties

When two or more persons guarantee the same debt jointly or severally, whether under the same or different contracts, they are known as co-sureties. As the co-sureties share the liabilities, they have in equity also the right to share the means of recovery.

11. **Right to share the Securities Rateably (Proportionately):** If they are liable in equal amounts, they will be entitled to share equally the securities belonging to the principal debtor in possession of the creditor. In case their liabilities are unequal, they will share the securities rateably.

12. **Right to contributions :** If any one of the sureties has to pay more than his share, he has a right to call upon his co-sureties for such contribution as will enable him to recoup himself to the extent of excess amount paid by him over and above his proportionate liability.

13. **Right to counter-security :** Co-surety has also the right to benefit of a counter-security given to another surety by the principal debtor.

14. **Right to plead the co-sureties and debtor in one suit :** It is open to a surety to implead the co-sureties as well as the principal debtor in one suit. Where one surety has paid more than his proportionate share the proper procedure is to file a suit for contribution against his co-surety making the principle debtor also a party thereto.

Rights of the Creditor against Surety

1. Demand payment when due: As the liability of the surety arises, the creditors is entitled to demand payments from the surety although the debt is time-barred against the principal debtor (*Bombay Dyeing and Manufacturing Co. Ltd. Vs. State of Bombay, 1985*) or principal debtor has been adjudged as bankrupt or the principal debtor's contract is void or voidable. He can file a suit against the surety without suing the principal debtor even if the principal debtor is solvent. The liability of the surety is immediate and not be deferred until the creditor has exhausted his remedies against the principal debtor.

2. Proceed against Surety before resorting to debtor's securities: A creditor can directly proceed against the surety before resorting to the securities deposited by the principal debtor. This is feasible although the liability of the surety becomes the primary one along with the principal debtor. Of course, a contract may specifically provide that the creditor must exhaust his remedies against the principal debtor or give notice of default or proceed against the securities.

3. Claim for Legal Expenses: A creditor can claim the cost of baseless legal suit against the principal debtor, sued at the request of the surety i.e., *the right of indemnity.*

4. Prove against the Official receiver in case of surety's insolvency: If the surety becomes insolvent, the creditor has the right to recover the dues from the estate of the insolvent party.

5. Proceed against any One Surety in the case of co-sureties: In case of co-sureties, the creditor will be at liberty to proceed against any one of the sureties for the whole debt because the liability of sureties is joint and several.

6. Concurrent remedy: A creditor may also pursue his remedy concurrently against both the principal debtor and the surety , and obtain a degree against both in the same suit.

Rights of Co-sureties among themselves

1. Co-sureties have liabilities among themselves under Sec.132: Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third party not being a party to such a contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

2. Release: Where there are co-sureties, a release by the creditor of one of them does not discharge the other neither does it free surety so released from responsibility to other sureties (Sec. 138).

3. Contribution: Co-sureties are liable to contribute equally if there is more than one surety in respect of one debt, though contracted on different dates unless contracted otherwise (Sec. 146).

4. Equality: Where the sureties are bound in different sum, they are bound to pay equally as far as the limits of their respective obligations permit (Sec. 147).

Liabilities of Co-sureties

Co-sureties are jointly and severally liable in India. The discharge of one co-surety from his liability does not release the other co-sureties from their liability. *They are liable to bear the loss equally, subject to the limit of the debt guaranteed by him.* As mentioned earlier, if one of

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons for your answer:

1. A contracts to indemnify B against the consequences of proceedings which C may take against B in respect of a certain sum of money. C obtains judgments against B for the amount. Without paying any portion of the decree amount, B sues A for its recovery. Will B succeed?

   [*Hint.* Yes, B will succeed because the liability of the indemnifier (i.e.,A) commences as soon as the liability of the indemnified (i.e., B) becomes absolute].

2. A is employed as a cashier on a salary of Rs.9,000 a month by a bank for afterwards, when the period of three years, C standing surety for A's good conduct. Nine months financial position of the bank deteriorates, A agrees to accept a lower salary of Rs. 7,000 a month. Two months later, it is discovered that A has been misappropriating cash all through. What is the liability of C?

   [*Hint.* C is liable as a surety for the loss suffered by the bank due to misappropriation by A during the first nine months but not for misappropriations committed after the reduction in salary. (See illustration (c) to Sec.133].

3. B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. B then becomes insolvent. Thereafter C sues A for the debt. A pleads C's forbearance to sue B for a year as a defence. Is this a good defence?

   [*Hint.* No, this is not good defence and C must succeed. Mere forbearance on the part of the creditor to sue the principal debtor does not discharge the surety, unless otherwise agreed (Sec.137)].

4. A guaranteed Z against trade debts to be contracted by M as a running balance of account to any amount not exceeding Rs. 8,000. M became indebted to Z for 10,000 rupees and made a compromise with Z for 60 paise in the rupee, leaving a balance of Rs.4,000 due to Z. Z brings action against A, claiming this amount under the guarantee. Decide?

   [*Hint.* Z is not entitled to recover the balance of Rs. 4,000 from A because, as per Section 135, the liability of the surety is discharged when a creditor in composition with his principal debtor accepts a lesser amount in full satisfaction of his claim].

5. C advances to D Rs. 5,000 on the guarantee of A. The loan carries interest at 15 per cent per annum. D becomes financially embarrassed subsequently. On D's request, C reduces the interest to 12 per cent per annum and does not sue D for one year after the loan becomes due, D becomes insolvent. Can C sue A?

   [*Hint.* C cannot sue A, because a surety is discharged from liability when, without his consent, the creditor makes any change in the terms of his contract with the principal debtor, no matter whether the variation is beneficial to the surety or does not materially affect the position of the surety (Sec.133)].

6. C guarantees A against trade debts to B contracted by B as a running balance of account to any amount not exceeding Rs. 3,000 and B becomes indebted to A for Rs. 5,000. Afterwards, B is adjusted insolvent and a dividend of 50 paise in the rupee is declared. State the amounts that A will get from C and from B's estate.

   [Hint : A will get Rs. 2,500 (one-half of Rs. 5,000) from B and the balance Rs. 500 (Rs. 3,000 - Rs. 2,500) from C].

7. A and B are co-sureties for C. A agrees to be liable to the extent of Rs. 1,000 and B to the extent of Rs. 1,500. C makes a default of Rs. 1,500. How much should A and B pay?

   [Hint : Sec. 146 of the Indian Contract Act provides that were there are two or more co-sureties for the same debt and the principal debtor makes a default, the co-sureties, in the absence of a contract to the contrary, are liable to contribute equally to the extent of the default. In the present case C has made a

default of Rs. 1500 and this amount will be contributed equally by A and B viz. Rs. 750 each].

8. A held partly paid shares in a company and D guaranteed the payment of his unpaid calls to the company. The Company called upon A to pay the calls, on default being made, forfeited the shares under a power given in the articles. What is surety's liability?

[*Hint :* Surety is discharged from his liability since the company has deprived D of his lien on the shares. Refer *Darwen & Pearce (1927)*].

9. B appointed A as his agent to collect his rents and required him to execute a fidelity bond in which C was surety. Sometime after the execution of the bond, C died. A committed various acts of dishonesty after C's death. Is C's estate liable for loss caused to B?

[*Hint :* No (Sec. 131)].

10. A undertakes to build a house for B within a certain period, B supplying the necessary materials. C guarantees the performance of the contract. B fails to supply the necessary materials. Discuss the position of C.

[*Hint :* C is discharged of liability (Sec. 134)].

Definition of Bailment: Section 148 of the Indian Contract Act defines a Bailment thus. *A Bailment is the delivery of goods, by one person to another, for some specified purpose, and upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them. The person delivering the goods is called* the *Bailor. The person to whom they are delivered is called the Bailee.*

Characteristics of Bailment

1. A bailment is normally *based upon a contract* either express or implied between the bailor and the bailee. However, the finder of goods is an exception to this rule i.e., a finder of goods becomes a bailee though there is no contract between the finder and the true owner. A person already in possession of goods may become a bailee by a subsequent agreement, express or implied.
2. A bailment necessarily involves *delivery of goods* by one person (called the *bailor*) to another person (called the *bailee*) for some purpose upon a contract. Delivery, however, may be actual or construction.
3. In bailment, the *possession of goods* must change, though temporarily.
4. In bailment, *ownership of the goods* is retained by the bailor. It is not transferred.
5. The delivery of goods in bailment is *for some purpose*. The purpose may be the lending, giving or depositing the goods for
   (i) safe custody, or
   (ii) as a security for a debt, or
   (iii) for repair, or
   (iv) for conversion of form etc.
6. When the purpose for which the bailment is created, is accomplished, *the goods are to be returned or disposed* according to the instructions of the bailor. The goods returned should be the same ones which were bailed.
7. Bailment is possible only of *goods* i.e., of movable property and chattels and not of immovable property.

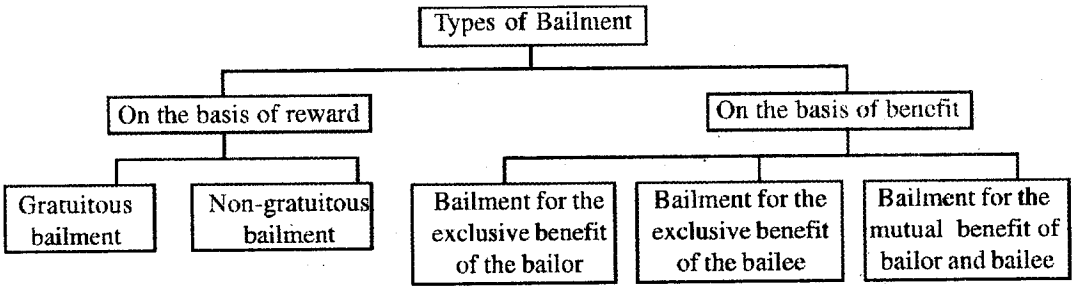
This money paid into a bank to the credit of a current (or any type of) account does not constitute bailment. *Money and actionable claims are not goods.* However, the deposit of government promissory notes, promissory notes, with the bank for safe custody is treated as bailment. But if they are sent for collection, it is not bailment.

Bailment With Reward and Without Reward

Gratuitous and Non-gratuitous bailment: A *gratuitous bailment* is that in which neither the bailor nor the bailee is entitled to any remuneration e.g., lending of a book to a friend. On the other hand, a *non- gratuitous bailment* is that in which either the bailor or the bailee gets remuneration e.g., giving of a watch or scooter for repair or clothes for stitching. It is also called as *bailment for reward.* Cases of bailments for reward are divided into two classes. viz.,

(i) those in which a reward is received by the bailor, and

(ii) those in respect of which the reward is to be received by the bailee.



Rights of Bailor

1. Restoration of goods lent gratuitously
2. Entitled to increase or profits to goods bailed
3. Enforcement of rights
4. Claim damages
5. Right of termination
6. Right to share in the compensation received in any suit by the bailee.

Duties of Bailor

1. To Disclose faults in goods bailed
2. Repayment of expenses
3. Responsibility for lack of title
4. To receive back the goods

Rights of Bailee

1. Right to Compensation
2. Right to remuneration
3. Rights to Particular Lien
4. Right of General Lien
5. Right to claim compensation in case of faulty goods
6. Right to Inter-plead
7. Right to bailment by several joint owners
8. Right to sue against wrong-doers

Duties of Bailee

1. Duty of reasonable care of goods bailed
2. Not to make unauthorised use of goods bailed
3. Duty not to mix goods bailed with other goods
4. Duty to return goods without demand
5. Duty not to set up adverse title

Rights of Pledgee

1. *Rights of retainer*
2. *Security for subsequent Advances / debts*
3. *To recover any extraordinary expens*
4. *To bring civil suit for amount due*
5. *Sale after notice*
6. *Right to damages*
7. *Right to indemnity*
8. *Remedy against deprivation*

Duties of a Pledgee/ Pawnee

1. *Take reasonable care*
2. *Not to make any unauthorised use*
3. *Return on repayment*
4. *Return any increase or profit*
5. *Right to increase or profit*

Duties of a Pledgor/Pawnor

1. *Disclose the faults*
2. *Meet extraordinary expenses*
3. *Indemnify the pledgee*

PLEDGE BY NON-OWNER

Generally, *no person can pledge the goods except when he is the legal owner of the goods.* But under certain circumstances a pledge by a non-owners is also valid.

1. Pledge by a *mercantile agent* (Section 178);
2. Pledge by person in *possession under voidable contract* (Sec.178.A);
3. Pledge by *pawnee* who has only a limited interest (Sec.179)
4. Pledge of *co-owner*: A Joint owner who is in sole possession of the goods, with the consent of others, can make a valid pledge.
5. *Seller* in possession after sale: A seller, left in possession of goods sold, is no more owner of the goods but a pledge created by him is valid, provided the pawnee acts in good faith and has no notice of the sale of goods to the buyer.
6. Where a *buyer* or person who has agreed to buy, obtains possession of goods with the seller's consent , before the payment of price, pledges these goods to a pawnee who takes them in goodfaith and without notice of the seller's right of lien or any other right of the seller pledge in valid.

REVIEW QUESTIONS

Section - A (Short Answer Questions)

1. What is the origin of the term 'bailment'?
2. Define bailment.
3. A contract of bailment may be without consideration. Why?
4. Explain how a bailment may result without the owner actually delivering the goods to the bailee.
5. What is the duty of a bailee as regards care of goods bailed?
6. A bailee must not mix the goods of the bailor with his own goods. What happens if he does so without the bailor's consent?
7. What are the rules regarding return of goods by the bailee?
8. What happens if a bailor does not disclose the known faults in the goods to the bailee?
9. To what extent is a bailee responsible for loss arising from defective title of the bailor?
10. Who is a gratuitous bailee?
11. In bailments, what factor is considered in determining whether or not a bailee took reasonable care of the goods bailed?
12. In case the goods are bailed for hire, is a bailor responsible for those faults which are not known to him?
13. Explain a bailee's duty of care towards the goods bailed.
14. Where the title of a bailor to the goods is defective and the bailee suffers as a consequence, what is the liability of the bailor?
15. What do you understand by bailee's lien? Is it the same thing as particular lien?
16. Distinguish between a general lien and a particular lien.
17. Who are entitled to general lien?
18. If a third person wrongfully deprives a bailee of the use or possession of the goods bailed, or does them any injury, who can take action against that third party?
19. When can a finder of goods sell them?
20. What is the legal position of a finder of lost goods?
21. "The position of a finder of goods is exactly that of a bailee in the case of a deposit" Explain.
22. When does a contract of bailment terminate?
23 What is a pledge?
24. What is the object of a contract of pledge?
25. Who is a pledger?
26. How does a pledge differ from a bailment?
27. What is the right of a pawnee against the true owner, when the pawnor's title is defective?
28. Where a pawner fails to redeem his pledge, what are the rights of the pawnee?
29. Who is a mercantile agent?
30. When is a pledge created by a co-owner valid?

Section - B (Descriptive Answer Questions)

1. Define bailment and state its characteristic features. Discuss the various kinds of bailment.
2. Discuss the rights and duties of bailor and bailee.

3. What are the circumstances in which the contract of bailment stands terminated?
4. What are the rights and duties of the finder of lost goods?
5. Define a pledge. Discuss the rights of the pledgee and pledgor.
6. When will a pledge made by a non-owner of the goods be valid?
7. What is a lien? State its kinds.
8. Distinguish between
   (a) Particular lien and General lien
   (b) Bailment and Pledge
   (c) Pledge and Lien.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons for your answers:

1. A gives some cloth to a tailor for making a suit of it. The tailor's charges are settled at Rs. 1,000. After the suit is a ready A tenders Rs.1,000 for the charges but the tailor refuses to deliver the suit till A pays an old dues of Rs.200. Is the tailor entitled to do so?

   [*Hint.* The tailor is not entitled to refuse to deliver the suit for the old debt of Rs.200, because a bailee, who renders a services involving the exercise of labour or skill in respect of the goods bailed, so as to confer an additional value on the article, is entitled only to a right of 'particular lien' i.e., a right to retain only that particular thing in respect of which the charge is due (Sec.170)].

2. A lady employed a goldsmith for the purpose of melting old jewellery and making new ones. Every evening as soon as the goldsmith's work for the day was over, the lady used to receive the half made jewellery from the goldsmith's house of which she retained the key. One night the box was stolen. Is the goldsmith liable to make good the loss?

   [*Hint.* The goldsmith is not liable to make good the loss of jewellery because he cannot be said a bailee of the goods. The bailment must be taken to have come to an end as soon as the lady was put in possession of the half made jewellery. Again, the lady herself took away the key and therefore, there was no effective delivery of the contents of the box to the goldsmith either actually or constructively. As such the goldsmith cannot be regarded as bailee thereof and cannot be made liable for the loss (*Kaliaperumal Pillai* Vs. *Visalakshmi, 1938*)].

3. A, finds a horse which carries a reward of Rs. 200 to the finder offered by B, the owner. A telegraphically informs B about the horse and spends Rs.15 thereon. B comes to take the horse after two days and during the intervening period A spend Rs.80 on feeding the horse. A returns the horse to B without insisting prepayment of his lawful charges of Rs. 95 and the amount of reward. Subsequently B refuses to pay. A files a suit against B for the recovery of Rs.295. Will he succeed?

   [*Hint.* A will succeed only for the recovery of the amount of reward i.e., Rs.200 because here there is a contract between A and B. B. while offering the reward, made a general offer which A accepted by returning the horse. But A cannot recover the amount of expenses i.e., Rs. 95 as there is no contract between the two in that regard. A also cannot exercise the right of lien as possession has been lost (Sec.168)].

4. A pledges with B jewels worth Rs.60,000 and borrows Rs. 30,000 at 12 per cent interest per annum, promising to repay the amount and redeem the jewels within a year, B. having apprehension about the safety of the jewels, because of increasing burglaries in the town, not only insures the jewels but also buys a strong safe at a cost of Rs.800, there being no safety value in that town and keeps the jewels in that safe. Now, when A comes to repay the loan , B claims the amount due for principal and interest, cost of insurance and cost of the safe. But A admits liability only for the principal and interest. Decide?

[*Hint.* B is entitled to recover from A the amount of the principal and the interest plus the cost of insurance and of the safe. As regards cost of insurance and of the safe, it should be noted that under Section 175, B the pawnee, is entitled to these expenses also as they have been incurred for the preservation of the goods pawned and are such which any person of ordinary prudence would reasonably incur in the given circumstances].

5. B handed her jewellery M to value it and tell her what advance he could make on them, it being agreed that M was to keep the jewellery as security if he made the advance. On the same M pledged the jewellery with A, A pawnbroker, who advanced 1,000 in good faith. Four days later M advanced 500 to B on the security of her jewellery. Subsequently on coming to know of the transaction between M and A, B paid the amount she had borrowed and sued A for the recovery of her jewellery contending that when M advanced the money. no valid pledge could arise as there was no delivery of goods in pursuance of the contract of pledge and M had already parted with the possession of the goods by pledging them with A. Will B succeed ? Give reasons.

[*Hint.* No, B will not succeed as the pledge is valid. The facts in the instant case are similar to *Blundell* vs *Atten* (1921). In that case it was held that the pledge was valid. Delivery made four days before was a good delivery for the purpose of creating a pledge, whenever that pledge was created. " Delivery of possession and advance need not be simultaneous and a pledge may be perfected by delivery before or after the advance is made" (*Lallan Prasad* Vs. *Rahmat Ali, A.I.R. 1967, SC, 1322*). B would have succeeded had she made the payment of 500 along with interest to A. instead of M because the pledge in between M and A was valid only to the extent of M's interest in the jewellery, namely, 500 (amount of advance to B.) Of course, on making the payment to M,B has a right to sue M for the redemption of her jewellery].

6. A lends his motor car to B for a drive by him only. B allows his daughter C, who is an expert car driver, to drive the vehicle. C drives the car carefully but its axle suddenly breaks and the car is damaged. Is B liable for the damage?

[*Hint.* Sec. 154 of the Indian Contract Act states that if the bailee uses the goods bailed in a manner which is inconsistent with the terms of the contract, he shall be liable for any loss even though he is not guilty of negligence, and even the damage is the result of an accident. In the present case, the motor car was lent to B for his personal drive only. He allowed his daughter to drive the vehicle which was inconsistent with the terms of the contract. Thus, even the car was driven carefully yet B is liable for damages to A for inconsistent use of bailed goods].

7. P who wanted to attend a cinema left his car in D's grounds after having paid a rupee and obtained a 'car park ticket'. He returned from the cinema and found that the car had been stolen by someone. P sues D as bailee for negligence. Decide.

[*Hint.* According to Sec. 151 of the Indian Contract Act, the bailee is bound to take reasonable care of the goods bailed. If the goods are destroyed or stolen by the negligence of the bailee, he is liable to make good the loss to the bailor. In the present case, the car is stolen due to negligence on the part of D and he is liable to make good the loss of P].

8. A gave a piece of cloth to B, a tailor, to be stitched into a suit. B retained the cloth for a period longer than was necessary and neglected to return it or the suit, even on A's persistent demand. Subsequently a fire broke out in B's shop and the cloth was destroyed. Is B liable for the loss?

[*Hint.* According to Sec. 160 of the Contract Act, it is the duty of the bailee to return or deliver the goods bailed according to bailor's directions as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. Sec. 161 further provides that if he fails to do so, he is liable to the bailor for any loss notwithstanding the exercise of reasonable care on his part. In the present case, B refused to deliver the cloth to A on persistent demand and hence he is liable for the loss to A. This problem is based on the leading case 'Shaw & Co. Vs. Symmons & Sons'].

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C H A P T E R - 12

CONTRACT OF AGENCY

CHAPTER OUTLINE

DEFINITION OF CONTRACT OF AGENCY
ESSENTIALS OF CONTRACT OF AGENCY
CREATION OF AGENCY
AGENCY BY RATIFICATION
NATURE OF AUTHORITY OF AN AGENT
SUB-AGENT AND SUBSTITUTED AGENT
RIGHTS, LIABILITIES AND DUTIES OF AGENT
PERSONAL LIABILITY OF AGENT
TERMINATION OF AGENCY
IRREVOCABLE AGENCY

Law relating Agency is contained in chapter X of the Indian Contract Act, 1872 (Sections 182 to 238). *Agency is a contractual relation between two parties created by agreement express or implied.* The relationship of agency arises wherever one person called the *agent* has authority to act on behalf of another called the *principal.*

Essentials of Contract of Agency

1. The relationship of an agency is based upon a contract.
2. The contract may be either express or implied.
3. There should be the appointment by the principal of an agent.
4. The Principal should confer authority on the agent to act for him.
5. The authority conferred should be such as will make the principal answerable to third parties.
6. The object of the appointment must to establish relationship between principal and their parties.
7. The relationship of the agency is based on confidence between the principal and the agent.

Anyone may be an Agent : Section 184 of the Contract Act provides that any person may become an agent. In other words, *even a minor can be employed as agent and the principal shall be bound by the acts of such an agent.* But no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal. Thus, if an agent is to be held liable to the principal, he must be a major and of sound mind.

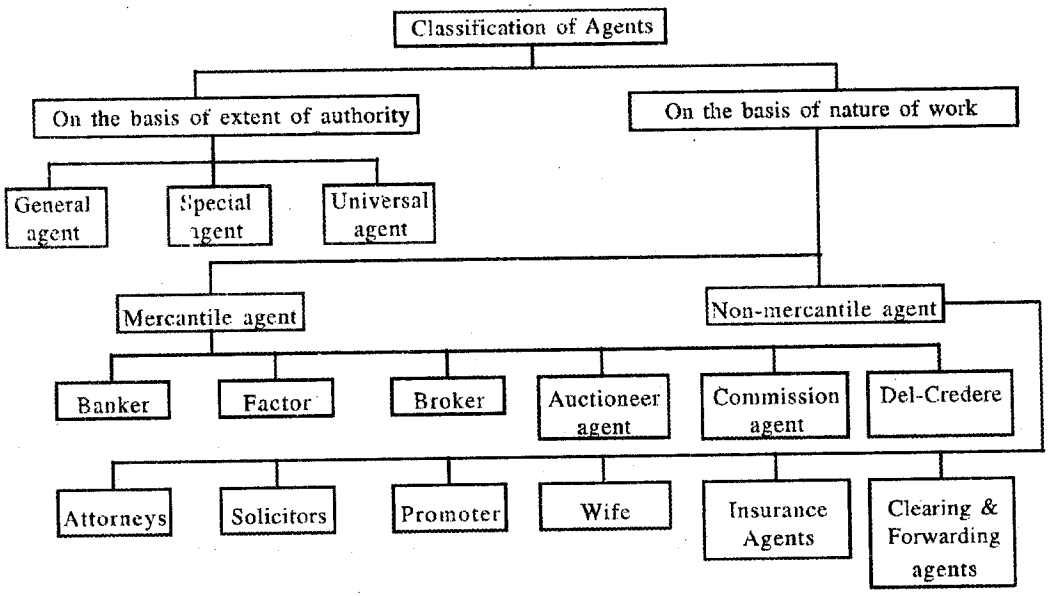
A person who is *major* and who is of *sound mind* can employ another person as an agent. Section 183 states that person who is the age of majority and is sound mind can become a principal. Thus, *a minor cannot act as principal.* It may be noted that consideration is an essential element for the validity of every contract, but, section 185 lays down that " *No consideration is necessary to create an agency*". A contract of agency is one of *good faith*; the agent must disclose to the principal in the making of the contract with the third parties.

Classification of Agents: 1. Express or Implied agents: 2. General, Special or Universal agents; 3. Agent or Sub-agent. Another broad classification of agents is *mercantile (or commercial) agents and non-mercantile (or non-commercial) agents.* The following are some of the important mercantile agents. Banker, Factor, Broker, Auctioneer, Commission Agent and *Del Credere* Agent.

1. **Banker :** Banker acts as an agent of the customer when he collects cheques or drafts or bills or buys or sells securities on behalf of his customers. He has a *general lien* in respect of the general balance of account.
2. **Factor :** A factor is one who is entrusted with the possession of goods and who has the authority to buy, sell or otherwise deal with the goods or to raise money on their security. He has a *general lien* on the goods.
3. **Broker :** A broker is one who negotiates and makes contracts between the principal and the third party. He is not entrusted with the possession of goods and hence he has *no lien* on the goods.
4. **Auctioneer :** An auctioneer is one who is entrusted with the possession of goods for sale at a public auction. He has only a *particular lien* on the goods for his charges.

5. **Commission Agent :** The term 'commission agent' is a general term which is used in practice even for a factor or broker.
6. **Del credere agent :** An agent who in consideration of an extra remuneration guarantees to his principal the performance of the contract by the other party. The *del credere* commission is a higher reward than is usually given in the form of a commission. He occupies the position of a guarantor as well as of an agent. But his liability is secondary and arises only on the insolvency or failure of the party. A *del credere* agent is appointed generally when the principal deals with a person about whom he knows nothing.

Non-mercantile agents include counsel, solicitor, guardian, promoter, wife, receiver, clearing and forwarding agent; they are always engaged by merchants to conduct their suits in connection with mercantile disputes.



Difference between a Factor and a Broker

1. A factor is a general agent, whereas a broker is a special agent.
2. While the *authority of a factor is general and undefined*, the authority of a broker is specific and defined.
3. A factor has the *possession of goods*. But a broker does not have the possession of goods.
4. A factor can *sell the goods* in his own name, whereas a broker has no such power.
5. A factor need not *disclose the name of this principal*. But a broker has to disclose the name of his principal.
6. A factor can *receive the payment* of the price of the goods sold and give a valid discharge (i.e., receipt) to the buyer in his own name. But a broker cannot receive payment and give receipt in his own name.

7. A factor will be personally *liable to third parties*, when he does not disclose the name of his principal. But a broker is not personally liable to third parties.
8. A factor *can sue and be sued* on the contract entered into by him in his own name. But a broker cannot sue and be sued in his own name in relation to the deal struck by him.
9. A factor has an *insurable interest* in the goods in which he deals, whereas a broker has no insurable interest in goods.
10. A factor has a *general lien* on the goods of his principal in his possession. On the other hand, a broker cannot have a lien, as he is not entrusted with the possession of goods.

Difference between a Commission Agent and a Del Credere Agent

1. A commission agent undertakes only the function of sale of goods on behalf of his principal. But a del credere agent not only undertakes to sell goods on behalf of his principal, but also guarantees the payment of the price of the goods which he sells on credit. In other words, a del credere agent serves both as an agent and a guarantor.
2. A commission agent may buy or sell goods on behalf of his principal. But a del credere agent comes into picture only in the context of sale of goods on behalf of the principal.
3. A commission agent comes into picture in the case of cash sales as well as credit sales of goods. But a del credere agent comes into picture only in the case of credit sales of goods.
4. The ordinary selling commission payable to a commission agent is based on total sales. But the extra del credere commission payable to a del credere agent may be based either on total sales or only on credit sales.
5. A commission agent does not protect the principal against the risk of bad debts involved in credit sales. But a del credere agent protects the principal against the risk of bad debts involved in credit sales.
6. The duties and responsibilities of a del credere agent are more than those of a commission agent.

Universal Agents : A universal agent is an agent whose authority to act for the principal is universal or unlimited. In other words, a universal agent is an agent who is authorised to do any legal act on behalf of his principal. A universal agent is, usually, appointed by a principal (i.e., businessman) who, because of his physical conditions, wants to retire from business, giving a blanket power of attorney to the agent. A universal agent has unlimited authority to do all such acts as could be delegated, and which the principal himself could lawfully perform. In short, he has authority to bind the principal by any legal act.

CREATION OF AGENCY

An agency may arise in different ways. It need not be created expressly by any writing and may be inferred from the circumstances and conduct of the parties. An agency may be constituted in following ways: (1) by *express agreement*; (2) by *implication* or *law*, i.e., from the conduct of the parties or from the necessity of the case, (3) by *ratification*, (4) *by operation of law.*